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Supreme Court, U.S.
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No.

In The
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

HARRY WOLSKY, INC.

PETITIONER

VS.

INDUSTRIAL COMMISSION OF OHIO
AND
OHIO BUREAU OF WORKERS' COMPENSATION

RESPONDENTS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner, Harry Wolsky Inc., a New York corporation, engages in wooden staircase manufacturing at its factory in Logan, Ohio. On February 2, 1978, Petitioner filed an "Application for Classification of Industry and for Premium" with the Underwriting Section of the Ohio Bureau of Workers' Compensation. In order to determine Petitioner's insurance premium, the Bureau assigned Petitioner a manual classification number based on the nature of its industry and manufacturing operation. Beginning March 8, 1978, the Bureau assigned manual number 2731, which is the corresponding code for the pallet manufacturing industry.

All correspondence between Petitioner and the Bureau before January 26, 1984 contained manual number 2731, but described manufacturing activities as being staircase manufacturing. Consequently, Petitioner paid a premium rate which did not correspond with the description of its industry. Under the Bureau's current insurance fund manual, the premium rate for pallet manufacturer (#2731) is higher than the rate for wooden staircase manufacturer (#2883-18).

On or about January 26, 1984, the Bureau mailed a payroll report to Petitioner for the period of July 1, 1983 to December 31, 1983. The report designated the manual numbers as 2731 and 8810 and described Petitioner's operations as "pallet manufacturing wood including all incidental operations and clerical, personnel only-on duties in shop or out of office." Upon discovery of this information in the payroll report, Petitioner notified the Bureau, by letter dated July 27, 1984, of the improper characterization of its manufacturing activities. Petitioner demanded full restitution of all premium amounts improperly billed from February 21, 1978 through July 27, 1984. Petitioner also requested a correction in future payroll reports to manual number 2883-18.

The Bureau conducted an audit upon receiving Petitioner's letter which recommended a reassignment of Petitioner's manual classification to manual number 2883. On December 4, 1984, the Bureau notified Petitioner that the payroll of its

employees should be reported under manual numbers 2883 and 8810. On March 22, 1985, the Bureau refunded Petitioner the sum of $13,267.84 and credited Petitioner for overpayments effective January 1, 1982. The Bureau did not return or credit the sum of $38,232.32 which represented the amount of overpayments for the period of February 21, 1978 to December 31, 1981. This decision was based on an Ohio Administrative Code provision[1] limiting the time period for adjustment for errors in premium assessments to the two year period immediately prior to the beginning of current payroll period when the errors are brought to the attention of the Bureau and Commission. Petitioner's administrative appeals were denied by the Bureau and the Industrial Commission of Ohio.

Petitioner brought an original action in mandamus to compel the Industrial Commission of Ohio and the Bureau of Workers' Compensation to refund $38,232.32 in insurance premiums that were improperly assessed to Petitioner. The Court of Appeals for the Tenth Appellate District of Ohio declined to issue a writ of mandamus, holding that the limitation period promulgated by Respondents was reasonable, not in conflict with other statutes, and enforceable by Respondents. On April 13, 1991 the Ohio

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[1] Ohio Adm. Code 4121-7-17(C). The Commission and Bureau shall have the right at all times by its members, deputies, referees, traveling auditors, inspectors or assistants to inspect, examine and/or audit any or all books, records, papers, documents and payroll of employers for the purpose of verifying the correctness of reports made by employers of wage expenditures as required by law and Rule 4121-7-14 hereof. The Commission and Bureau shall also have the right to make adjustments as to classifications, allocation of wage expenditures to classifications, amount of wage expenditures, premium rates and/or amount of premium. No adjustments, however, shall be made in an employer's account which result in reducing the amount of premium below the amount of contributions made by the employer to the fund for the periods involved, except in reference to adjustments for the semi-annual and/or adjustment periods ending within twenty-four months immediately prior to the beginning of the current payroll reporting periods, when such errors affecting the reports and the premium are brought to the attention of the Commission and Bureau by an employer through written application for adjustment or found by the Commission and Bureau.

Supreme Court affirmed the decision of the Tenth Appellate District dismissing Petitioner's Constitutional challenges and upholding the validity of Ohio Adm. Code 4121-7-17(C).

REASONS FOR DENYING THE WRIT

The question Petitioner has brought to this court is whether a state, specifically the State of Ohio, that has a compulsory workers' compensation fund can limit the adjustment period for errors in calculating and assessing premiums. As Petitioner's argument is incoherent at best, it is difficult to discern the exact nature of the constitutional violations alleged, and the authority in support of those alleged violations. Respondent will attempt to address any alleged constitutional violations with reference to the arguments made by Petitioner before the Ohio Supreme Court.

PETITIONER HAS NOT BEEN DENIED EQUAL PROTECTION OF THE LAWS OR DUE PROCESS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The scope of this Court's review must begin with an analysis of the type of legislation challenged by Petitioner. Workers' Compensation statues have been held to be laws within the police power of the state. *Jeffrey Manufacturing Co. v. Blagg,* 235 U.S. 571 (1915). While the police power cannot be arbitrarily exercised as to deprive persons of their property without due process of law or to deny them equal protection of the law, it is one of the most essential powers of government and one of the least limitable as the imperative necessity for its existence precludes any limitation upon it when not arbitrarily exercised. *Hadacheck v. Sebastian,* 239 U.S. 394, (1915).

Petitioner alleges that it was denied equal protection laws because it was assessed higher premiums than similarly situated manufacturers competing with Petitioner. Respondent submits that Petitioner has not placed the correct focus on whether the administrative rules in question

violate its right to equal protection of the laws. The correct focus should be whether the remedial measures which restricted Petitioner's refunds were applied equally to all employers. Legislation affecting alike all persons pursuing the same business under the same conditions is not class legislation and is not subject to an equal protection challenge. See *Hadacheck v. Sebastian, supra.* Further, Equal Protection of the Laws is not denied by a legal proceeding in which a person is affected, if such a course would also be applied to any other person in the state under similar circumstances and conditions. *Tinsley v. Anderson,* 171 U.S. 101, (1898).

Respondents applied their long standing rules which were properly promulgated and part of the administrative code of the State of Ohio to limit the period for which corrections in assessments could be made. There is no evidence that Respondents have ever refunded premium overpayments made in excess of two years to other employers. Absent any evidence of disparate treatment from that of other similarly situated employers, Petitioner's equal protection arguments must fail.

Moreover, the limitation period provided by Ohio Adm. Code 4121-7-17(C) does not violate Petitioner's rights to equal protection of the laws or due process. Statutes of limitation have generally been held not to violate the equal protection clause. *Canadian N.R. Co. v. Eggen,* 252 U.S. 553, (1920).

> A man cannot be said to be denied, in a constitutional or any rational sense, the privilege of resorting to courts to enforced his rights when he is given free access to them for a length of time reasonably sufficient to enable an ordinarily diligent man to institute proceedings for their protection. *Id.* at 562.

Ohio Adm. Code 4121-7-17(C) gives employer two years to discover errors in premium calculation or manual classification. When construing Ohio Adm. Code 4121-7-14 and 4121-7-17(C), *in pari materia,* employers have the

opportunity to review payroll reports submitted to them every six months. Insurance manuals are available to the public to assist employers in determining whether the appropriate manual number on payroll correspond with the industrial description.

Given the above set of circumstances, Petitioner could have reasonably discovered the erroneous manual number much sooner than July 1984. Petitioner could have mitigated its losses by reviewing the insurance fund manual as early as 1978 to determine if the correct manual number was on the payroll report. Upon discovering any error, Ohio Adm. Code 4121-7-17(C) provides Petitioner with remedy.

Respondents cannot insure that its rules will be read by all employers who are covered under state workers' compensation laws. Nevertheless, Ohio Adm. Code 4121-7-17 is a properly promulgated rule to allow employers to protest error in manual classification. The rule has been public law since 1976 before Petitioner first initiated coverage under the Ohio workers' compensation law.

Furthermore, Ohio Adm. Code 4121-7-17(C) has a rational basis to encourage employers to mitigate their losses by reporting errors in premium calculation within the prescribed period. Given the amount of correspondence between the Bureau and employers covered under the workers' compensation system, there are many opportunities for employers to discover errors in their premium rates. Restricting the period of recovery to two years before the payroll period when errors are first reported, reduces the risk of stale claims that could have been avoided through careful review of the payroll reports and the insurance fund manual.

The duty to establish the appropriate premium rate is on Respondents and the employer. When an incorrect manual classification number is assigned, there are promulgated rules that allow employers to seek a correction and to claim a refund of overpaid premiums. Employers, however, share an equal obligation to review their payroll reports so that

errors can be quickly identified and corrected. Petitioner, inexplicably, did not discover errors in its premium calculation until six years after it registered for state-fund coverage. The existence of Respondents' rules and insurance fund manual establishes that Petitioner could have discovered the errors much sooner.

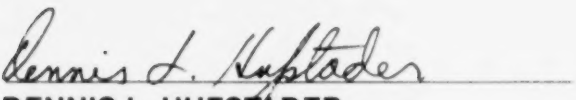
Petitioner has alleged no set of facts, nor provided any authority in support of any violations of its constitutional rights by the State of Ohio. Further, Petitioner has cited no conflict with decisions of other federal or state courts, and has described no important reasons for granting his petition.

CONCLUSION

For these reasons, Respondent, Industrial Commission of Ohio and the Ohio Bureau of Workers' Compensation respectfully request that this Court deny the petition for a writ of certiorari.

Respectfully submitted,

LEE FISHER
Attorney General of Ohio



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CERTIFICATE OF SERVICE

This is to certify that 3 copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari was mailed by regular U.S. Mail, postage prepaid on this 1st day of August ~~July~~, 1991 to Richard Michael Wallar, 30 W. Main Street, P. O. Box 882, Logan, Ohio 43138.

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